

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

R.I

30626

FILE:

B-216803

DATE: March 6, 1985

MATTER OF:

Aleman Food Service, Inc.

DIGEST:

1. It is within broad discretion of the contracting officer as to whether to delay bid opening pending Small Business Administration ruling on applicable small business size standard.
2. Invitation for bids (IFB) provision requiring that protest concerning terms or conditions of IFB must be filed with issuing activity at least 5 working days prior to bid opening only applies to protests filed with agency and in determining whether such protest was made timely to the contracting agency where there is a subsequent protest to GAO.
3. When only evidence of an issue of fact is a protester's statement which conflicts with that of contracting officials, protester has not carried its burden of proof.
4. Where invitation for bids states that collective bargaining agreement is applicable to the contract, bidder is bound to follow the collective bargaining agreement and any bidder who fails to obtain a copy of the agreement or relies on oral information without securing a copy of the agreement to verify the oral advice acts at his own risk.
5. Fact that statement of work in solicitation erroneously referred to 78 pages when there were only 73 is a minor informality.

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Aleman Food Service, Inc. (Aleman), protests award of a contract under invitation for bids (IFB) No. F29650-84-B-0110 issued by the Department of the Air Force for mess attendant services at Kirtland Air Force Base, New Mexico.

We deny the protest.

Aleman protests that, despite the fact it appealed the small business size standard in the IFB to the Small Business Administration (SBA) before bid opening, the contracting agency opened bids without waiting for the SBA determination which sustained Aleman's appeal. However, there is no requirement in the applicable regulations that a contracting officer delay the opening of bids until receiving an SBA ruling on the applicable size standard. See the Federal Acquisition Regulation, 48 C.F.R. § 19.303(c)(3) (1984). The regulation recognizes that bid opening need not be delayed, as it provides that if the SBA ruling is received after bid opening, the ruling will not apply to the current procurement and will have prospective effect only. Thus, it is simply within the contracting officer's broad discretion as to whether to delay the bid opening. Contract Services Co., Inc., B-210551, Feb. 22, 1983, 83-1 C.P.D. ¶ 176.

Aleman also protests that there was no Department of Labor (DOL) wage determination in the IFB, that the IFB provided for the collective bargaining rates of the incumbent contractor being furnished orally and that the statement of work erroneously referred to 78 pages rather than 73. The contracting agency contends that these protests are untimely because the IFB provided that protests concerning the terms and conditions of the IFB must be filed with the issuing activity at least 5 working days prior to bid opening and Aleman filed its protest with our Office on the bid opening date. However, the stringent 5-day limit is applicable only to a protest filed with the Air Force and only in determining whether the protest so filed was timely when the protest is subsequently filed with our Office. 4 C.F.R. § 21.2(a) (1984). The protests were filed initially in our Office prior to bid opening. That is all that was required by 4 C.F.R. § 21.2(a). Therefore, we will consider these protests.

The contracting agency has stated that there was no DOL wage provision in the IFB because none was provided by DOL. Three months after the bid opening, Aleman has provided a

copy of a DOL wage determination dated 17 days prior to bid opening and therefore questions the validity of the contracting agency's statement. While the wage determination may be dated prior to bid opening, Aleman has not provided any evidence that shows that the contracting agency received the wage determination before bid opening. When the only evidence of an issue of fact is a protester's statement which conflicts with that of contracting officials, the protester has not carried its burden of proof. Simulators Limited, Inc.--Reconsideration, B-215091.2, B-213046.6, Sept. 25, 1984, 84-2 C.P.D. ¶ 355.

Contrary to Aleman's statement, the IFB does not provide for the collective bargaining rates of the incumbent contractor being furnished orally. The IFB contains the Department of Defense Federal Acquisition Regulation Supplement clause which states that the collective bargaining agreement is applicable to the contract and provides that "copies" of the agreement can be obtained from the contracting officer. Thus, any bidder responding to the IFB is bound to follow the collective bargaining agreement and any bidder who fails to obtain a copy of the agreement or relies on oral information without securing a copy of the agreement to verify the oral advice acts at his own risk.

Finally, the fact that the IFB statement of work erroneously referred to 78 pages when there were only 73 pages is a typographical error and a minor informality which does not affect the validity of the IFB.

Protest denied.

for Seymour E. Fox
Harry R. Van Cleve
General Counsel